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Nor ak Nyawai & Ors (suing for and on behalf of themselves and all other occupiers, holders and claimants of native customary right land (NCR) at Sg Sekabai, Sg Tajem, Tatau, Bintulu, Sarawak) v Tatau Land Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–2167–09 OF 2012
BALIA YUSOF, TENGKU MAIMUN AND VARGHESE GEORGE JJCA
10 JULY 2014

Civil Procedure — Res judicata — Principles — Whether parties must be the same in both suits — Merger of rights

The dispute concerned Lot 16, Block 3, Sangan Land District, Bintulu. In 1999, the same plaintiffs herein had commenced an action ('the First Suit') where the plaintiffs had claimed native customary right ('NCR') land at Sg Sekabai, Sg Tajem, Tatau, Bintulu, Sarawak. The High Court had given judgment in favour of the plaintiffs in the First Suit. Lot 16 clearly fell outside the boundary of the area which the plaintiffs claimed to have acquired NCR. On 18 December 2008, the first defendant in the present action filed an originating summons ('the OS') seeking to recover possession of Lot 16 under O 89 of the Rules of the High Court 1980 ('the RHC'). The fourth plaintiff on behalf of himself and all the persons in occupation of Lot 16, opposed the OS. However, the affidavit in opposition of the fourth plaintiff was objected to by learned counsel for the first defendant on the ground of non-compliance with O 89 r 5 of the RHC. As the fourth plaintiff was not named as a defendant in the OS, it was contended by the first defendant that the fourth plaintiff should make a proper application to be joined as a defendant, which the fourth plaintiff had failed to do. On 20 November 2009, the High Court granted the possession order to the first defendant. The affidavit in opposition was not considered after all. Following the possession order, the first defendant applied for a writ of possession to enter Lot 16 and to execute the writ of possession. Consequently, vide the present action, the plaintiffs claimed, inter alia, for a declaration that the issuance of the provisional lease by the second and/or the third defendants to the first defendant was unlawful and null and void as it impaired the plaintiffs' NCR at the said lands. The first defendant applied under O 14A and O 18 r 19 of the RHC for determination whether the plaintiffs' action herein was res judicata and/or barred by issue estoppel as a result of the First Suit and the decision in the OS. The learned judicial commissioner held that as a result of the possession order and the writ of possession, the plaintiffs' action herein was res judicata and/or barred by issue estoppel. The plaintiffs' writ of summons and the statement of claim was thus

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struck out and hence, this appeal. The plaintiffs contended that they failed to oppose the possession order purely on technical ground or procedural ground and since the issue or merits of the action had not been heard, the plea of res judiciata was not sustainable.

Held, dismissing the appeal with costs of RM5,000:

(1) The plaintiffs were not specifically named in the writ of possession. However, the argument that the plaintiffs must be made a party in the writ of possession for the doctrine of res judicata to apply, was misconceived (see para 23).

(2) The writ of possession did not entail any hearing. The writ of possession was a mode of execution to enforce the possession order. The appropriate proceedings where the plaintiffs ought to be made a party would be during the hearing of the OS. The plaintiffs did in fact take steps to oppose the OS by filing the affidavit in opposition and the matter was heard in the presence of the solicitor acting for the plaintiffs (see para 24).

(3) If the plaintiffs' contended that the OS had not been heard on the merits, it was open to the plaintiffs to make the necessary application to set aside the possession order. In any event, the plaintiffs had appealed to the Court of Appeal against the possession order, which appeal was struck out by the Court of Appeal (see para 25).

(4) Applying the principle on the doctrine of res judicata as set out in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ and also in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57, and based on the possession order and the writ of possession which remained valid and subsisting, the plaintiffs' rights on Lot 16 had merged in the possession order made in the OS and in the execution of the same, vide the writ of possession (see para 26).

[Bahasa Malaysia summary

Pertikaian adalah berkenaan Lot 16, Block 3, Sangan Land District, Bintulu. Pada tahun 1999, plaintif-plaintif yang sama di sini telah memulakan tindakan ('Tindakan Pertama') di mana plaintif telah menuntut hak adat anak negeri ('HAAN') tanah di Sg Sekabai, Sg Tajem, Tatau, Bintulu, Sarawak. Mahkamah Tinggi telah memberi penghakiman memihak kepada plaintif-plaintif dalam Tindakan Pertama. Lot 16 jelas terangkum di luar sempadan kawasan yang mana plaintif-plaintif mendakwa telah memperoleh HAAN. Pada 18 Disember 2008, defendan pertama dalam tindakan ini memfailkan saman pemula ('SP') smemohon untuk mendapatkan semula milikan Lot 16 di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintif keempat bagi pihak dirinya dan kesemua orang yang menduduki Lot 16, menentang SP. Walau bagaimanapun, afidavit menentang plaintif keempat telah dibantah oleh peguam bijaksana untuk defendan pertama atas alasan

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ketidakpatuhan terhadap A 89 k 5 KMT. Memandangkan plaintif keempat tidak dinamakan sebagai defendan dalam SP, ia dihujahkan oleh defendan pertama bahawa plaintif keempat patut membuat permohonan yang betul untuk dimasukkan sebagai defendan, yang mana plaintif keempat gagal melakukannya. Pada 20 November 2009, Mahkamah Tinggi memberikan perintah milikan kepada defendan pertama. Afidavit membantah tidak dipertimbangkan langsung. Berikutan perintah milikan, defendan pertama memohon untuk writ milikan untuk memasuki Lot 16 dan untuk melaksanakan writ milikan tersebut. Akibatnya, melalui tindakan ini, plaintif-plaintif menuntut, antara lain, untuk perisytiharan bahawa pemberian pajakan sementara oleh defendan-defendan kedua dan/atau ketiga kepada defendan pertama adalah tidak sah dan batal kerana ia menjejaskan HAAN plaintif-plaintif di tanah tersebut. Defendan perrtama memohon di bawah A 14A dan A 18 k 19 KMT untuk penentuan sama ada tindakan plaintif-plaintif di sini adalah res judicata dan/atau dihalang oleh estopel akibat tindakan pertama dan keputusan dalam SP tersebut. Pesuruhjaya kehakiman yang bijaksana memutuskan bahawa akibat perintah milikan dan writ milikan, tindakan plaintif-plaintif di sini adalah res judicata dan/atau dihalang oleh estopel. Writ saman plaintif-plaintif dan pernyataan tuntutan oleh itu dibatalkan dan oleh itu, rayuan ini. Plaintif-plaintif berhujah bahawa mereka gagal untuk menentang perintah milikan semata-mata atas alasan teknikal atau alasan prosedur dan memandangkan isu atau merit tindakan tidak didengar, pli res judiciata tidak dapat diperthankan.

Diputuskan, menolak rayuan dengan kos sebanyak RM5,000:

(1) Plaintif-plaintif tidak dinamakan secara spesifik di dalam writ milikan. Walau bagaiamanapun, hujahan bahawa plaintif-plaintif mesti dijadikan pihak di dalam writ milikan untuk doctrin res judicata diguna pakai, adalah salah tanggap (lihat perenggan 23).

(2) Writ milikan tidak memerlukan apa-apa pendengaran. Writ milikan adalah cara pelaksanaan untuk menguatkuasakan perintah milikan. Prosiding wajar di mana plaintif-plaintif patut dijadikan pihak adalah pada masa pendengaran SP. Plaintif-plaintif sebenarnya telah mengambil langkah untuk menentang SP dengan memfailkan afidavit menentang dan perkara tersebut didengar dalam kehadiran pegumcara bertindak bagi pihak plaintif-plaintif (lihat perenggan 24).

(3) Jika plaintif-plaintif berhujah bahawa SP tidak didengar atas merit, adalah terbuka kepada plaintif-plaintif untuk membuat permohonan yang perlu untuk mengetepikan perintah milikan. Walau bagaimanapun, plaintif-plaintif telah merayu kepada Mahkamah Rayuan terhadap perintah milikan, rayuan yang mana dibatalkan oleh Mahkamah Rayuan (lihat perenggan 25).

(4) Mengguna pakai prinsip atas doktrin res judicata seperti yang ditetapkan

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di dalam kes *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ dan juga di dalam kes *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57, dan berdasarkan perintah milikan yang kekal sah dan wujud, hak plaintif-plaintif ke atas Lot 16 telah bergabung dalam perintah milikan yang dibuat di dalam SP dan dalam perlaksanaannya, melalui writ milikan (lihat perenggan 26).]

Notes

For cases on principles, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 7601–7604.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (folld)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57; [1997] 2 CLJ 104, CA (folld)

Tara Rajaratnam v Datuk Jaginder Singh & Ors [1981] 1 MLJ 232, FC (refd)

Legislation referred to

Limitation Ordinance (Cap 49) Schedule, Item 97
Public Authorities Protection Act 1948 s 2
Rules of the High Court 1980 O 14A, O 18 r 19, O 89, O 89 r 5
Sarawak Land Code 1958 (Cap 81) s 202

Appeal from: Suit No BTU-21–02 of 2011 (High Court, Bintulu)

Baru Bian (Simon Siah Sy Jen and Chua Kuan Ching with him) (Baru Bian) for the appellants.

Leonard David Shim (Wung Duk Ying with him) (Reddi & Co) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] This is the plaintiffs' appeal against the decision of the Bintulu High Court in allowing the first defendant's application to strike out the plaintiffs' writ of summons and statement of claim. For ease of reference, in this judgment, parties will be referred to as they were in the High Court.

[2] The background facts relevant to the appeal are as follows. The dispute concerns Lot 16, Block 3, Sangan Land District, Bintulu. Vide the present action, the plaintiffs on behalf of themselves and all other occupiers, holders and claimants of native customary right ('NCR') land at Sg Sekabai, Sg Tajem, Tatau, Bintulu, Sarawak, claimed against the defendants, inter alia, for a declaration that the issuance of the provisional lease by the second and/or the third defendants to the first defendant is unlawful and null and void as it

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impairs the plaintiffs' NCR and for a prohibitory injunction restraining the first defendant and/or their employees servants and/or agents from trespassing, clearing, using or occupying and commencing their development project on the plaintiffs' NCR land.

[3] In 1999, the same plaintiffs herein had commenced an action against Borneo Pulp Plantations Sdn Bhd; Borneo Pulp & Paper Sdn Bhd and the Superintendent of Lands and Surveys Bintulu in Kuching (Suit No 22–28 of 99–1) ('the First Suit'). In the First Suit, the plaintiffs had claimed NCR over the same lands as claimed by the plaintiffs in the present suit which are Rumah Luang/Rumah Nor in Sg Sekabai, Sg Tajem and Sg Ipuh, Sebauh, Bintulu Division, Sarawak (see para 3(a) of the statement of claim in the First Suit, p 58:RR1(A) and p 116 RR 11 (B&C). The area that the plaintiffs claimed in the First Suit was more particularly set out in the map marked 'A' and edged in red which was annexed to the statement of claim therein.

[4] On 12 May 2001, the High Court, Kuching gave judgment in favour of the plaintiffs in the First Suit. Justice Ian Chin made an order, inter alia:

> (d) the disputed area is to be reckoned by reference to the map admitted in evidence during the trial as exh P172 following as closely as possible the boundary of the disputed area that has been marked on the map.

[5] By reference to exh P172 in the First Suit, Lot 16 clearly falls outside the boundary of the area which the plaintiffs claimed to have acquired NCR.

[6] Aggrieved by the decision of the High Court, the defendants in the First Suit appealed to the Court of Appeal (Civil Appeal Nos Q-01–42 of 2001 and Q-20–504 of 2001). On 8 July 2005, the Court of Appeal allowed the appeal. The plaintiffs' application for leave to the Federal Court was dismissed.

[7] On 18 December 2008, the first defendant in the present action filed an Originating Summons No 24–74 of 2008 ('the OS') seeking to recover possession of Lot 16 under . The defendants in the OS were 'The Persons in Occupation of Lot 16, Block 3 Sangan Land District, Ulu Tatau, Bintulu Division, Sarawak.'

[8] The fourth plaintiff on behalf of himself and all the persons in occupation of Lot 16, opposed the OS. However, the affidavit in opposition of the fourth plaintiff was objected to by learned counsel for the first defendant on the ground of non-compliance with O 89 r 5 of the Rules of the High Court 1980 which provides:

> Without prejudice to Order 15, rules 6 and 10, any person not named as a defendant who is in occupation of the land and wishes to be heard on the question

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whether an order for possession should be made may apply at any stage of the proceedings to be joined as a defendant. A

[9] As the fourth plaintiff was not named as a defendant in the OS, it was submitted by learned counsel for the first defendant, inter alia, that the fourth plaintiff must make a proper application to be joined as a defendant, which the fourth plaintiff had failed to do (pp 149–154 of the ROA II (Pt B&C)). B

[10] On 20 November 2009, the High Court granted the possession order to the first defendant. From the order (pp 139–140 of the ROA II (Pt B&C)), it appears that the affidavit in opposition was not considered after all. Be that as it may, there was no application for stay of the possession order by any person in occupation of Lot 16, although an appeal was filed by the plaintiffs on 17 December 2009 against the decision of the learned judicial commissioner in granting the possession order (p 91 of the ROA II (Pt B&C)). On 16 April 2009, the Court of Appeal struck out the said appeal. C D

[11] Following the possession order, the first defendant, vide Application for Execution No 38–01 of 2009 applied for a writ of possession. Pursuant to the application, the writ of possession was issued on 10 December 2009, directing the Sheriff of the High Court Bintulu to enter Lot 16 and to execute the writ of possession. E

[12] On 19 January 2010, when the bailiffs went to Lot 16 to execute the writ of possession, some persons in occupation of Lot 16 requested the bailifff to give them three days to vacate the said land. The bailiff acceded to the said request. F

[13] Possession of Lot 16 was not given to the first defendant after the three days. Instead, on 22 January 2010 the plaintiffs filed the present action where the plaintiffs prayed for several declarations and applied for an injunction, essentially to restrain the first defendant from commencing their development project on Lot 16. The High Court granted an ex parte injunction on 26 January 2010 and after an inter partes hearing, the injunction order was extended until the determination of the suit. G H

[14] The first defendant filed an appeal to the Court of Appeal against the injunction order. On 17 November 2011, the Court of Appeal allowed the appeal and set aside the injunction (pp 143–144 of the RRII (part B&C)). I

[15] On 9 February 2012, the first defendant took out an application under O 14A and O 18 r 19 of the Rules of the High Court 1980 for the determination of the following questions of law:

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(a) whether the plaintiffs' action is res judicata and/or barred by issue estoppel as a result of the High Court Suit No 22–28 of 99–1 between *Nor ak Nyawai & 3 Ors v Borneo Pulp & Paper Sdn Bhd & 2 Ors* and the Court of Appeal's decision in Civil Appeal Nos Q-1–42 of 2001 and Q-20–504 of 2001 and the decision in the OS;

(b) whether the plaintiffs' claim and the reliefs sought are barred by reason of s 2 of the Public Authorities Protection Act 1948 and/or item 97 of the Schedule to the Limitation Ordinance (Cap 49) and/or s 202 of the Sarawak Land Code 1958 (Cap 81);

(c) whether the plaintiffs' action is maintainable as the plaintiffs ought to have filed an action by way of judicial review of the administrative action of the issuance of the documents of title to Lot 16; and

(d) whether the plaintiffs could apply for or be entitled to the remedies, reliefs or orders prayed for in the statement of claim as against the first defendant's title which is indefeasible.

[16] The learned judicial commissioner held, in particular, that as a result of the possession order and the writ of possession, the plaintiffs' action herein is res judicata and/or barred by issue estoppel. Consequently, the plaintiffs' writ of summons and the statement of claim was struck out, hence the plaintiffs' appeal before us.

THE APPEAL

[17] There was only one ground of appeal raised by learned counsel for the plaintiffs ie that the learned judicial commissioner erred in finding that the plaintiffs' action herein is res judicata and/or barred by issue estoppel as a result of the possession or writ of possession.

[18] Learned counsel relied on the case of *Tara Rajaratnam v Datuk Jaginder Singh & Ors* [1981] 1 MLJ 232 where Wan Suleiman FCJ said:

> To invoke the doctrine of res judicata the respondent has to show that there was a former suit between the same parties for the same matter and upon the same cause of action, and also the matter directly and substantially in issue has been heard and finally decided by the court which heard it.

[19] In the instant case, learned counsel submitted that the plaintiffs failed to oppose the possession order purely on technical ground or procedural ground. And since the issue or merits of the action has not been heard, learned counsel submitted that the plea of res judiciata is not sustainable.

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[20] It was further the submission for the plaintiffs that the cause of action in the writ of possession and the present action is different in nature because the writ of possession was allowed on the ground that the first defendant was the holder of the provisional lease without taking into consideration that the issuance of the provisional lease is conditional upon a survey whereas in the present action, the plaintiffs' claim is for a declaration that the plaintiffs' have native customary rights over part of the provisional lease.

[21] We were not able to agree with learned counsel for the plaintiffs. In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, Peh Swee Chin FCJ said:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect or creating an estoppel per rem judicatum. When a matter between two parties had been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; ...
>
> ...
>
> ... there are in fact two kinds of estoppel per rem judicatum. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.
>
> The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, ie the cause of action, merges into the said final judgment, in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is res judicata.
>
> ...
>
> On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a final judgment in which they, or their privies, were parties.

[22] The learned FCJ further said that:

> There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata ... We are of the opinion that the aforesaid contrary view is to be preferred ...

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[23] We accepted that the plaintiffs were not specifically named in the writ of possession. However, we were of the view that the argument of learned counsel that the plaintiffs must be made a party in the writ of possession for the doctrine of res judicata to apply, is misconceived.

[24] It must be highlighted that the writ of possession did not entail any hearing. The writ of possession was a mode of execution to enforce the possession order. The writ of possession was issued by an officer of the registry, upon payment of the necessary praecipe. Upon issuance of the same, the Sheriff/Bailiff will enter the property to effect execution. Hence, the appropriate proceedings where the plaintiffs ought to be made a party would be during the hearing of the OS. The plaintiffs did in fact take steps to oppose the OS by filing the affidavit in opposition and the matter was heard in the presence of the solicitor acting for the plaintiffs (see possession order at pp 139–140 of the ROA II (Pt B &C)).

[25] If it were the plaintiffs' contention that the OS had not been heard on the merits, in our view, it was open to the plaintiffs to make the necessary application to set aside the possession order. In any event, the plaintiffs had appealed to the Court of Appeal against the possession order, which appeal, as mentioned above, was struck out by the Court of Appeal.

[26] Applying the principle on the doctrine of res judicata as set out above and also in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57; [1997] 2 CLJ 104, and based on the foregoing facts, in particular that the possession order and the writ of possession remains valid and subsisting, we were of the view that the plaintiffs' rights on Lot 16 had merged in the possession order made in the OS and in the execution of the same, vide the writ of possession.

[27] In light of the foregoing, we were unanimous in our views that there was no merit in the plaintiffs' appeal. We found no error in the judgment of the learned judicial commissioner which warrants appellate intervention. In the circumstances the appeal was dismissed. We ordered costs of RM5,000 to be paid by the appellants to the respondent and the deposit to be refunded to the appellants.

Appeal dismissed with costs of RM5,000.

Reported by Kanesh Sundrum